DISCOVERY IN MASSACHUSETTS.

PART II.

THE RIGHT TO QUALIFY ANSWERS.

BESIDES placing restrictions on the duty to answer, some of which have already been discussed,[1] the statute further protects a party by allowing him to introduce into his answer "any matter relevant to the issue to which the interrogatory relates."[2] This right, if skillfully used, may be a great protection; but the question arises as to the meaning of the word "issue" as used in the statute.

The original act provided that "the party interrogated may introduce into his answer any matter explanatory of his admissions or denials, if relevant to the interrogatory which he is answering, but not otherwise."[3]

Under this section the Court of Common Pleas ruled that in answering an interrogatory as to the making of a loan sued on, the defendant, admitting the making of the loan, could not introduce a statement that it was paid or settled.[4] The practical result, therefore, was that a dishonest plaintiff could force an honest defendant to admit the loan and then deny payment, and, as the defendant could not take the stand, he would lose his case unless he had a witness or some evidence of payment. In 1852, when the new act was revised,[5] the law was changed to its present form, already quoted, under which the court decided, in Baxter *v.* Massasoit Ins. Co.,[6] that a party, in answer to a question whether an insurance policy was filled out, might answer that it was filled out but never delivered. In the opinion Hoar, J., stated that "the issue to which the interrogatory relates" meant "the issue in the cause between 'the parties,'" and that issue was "whether a

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[1] Discovery in Massachusetts, Part I., 16 HARV. L. REV. 110.

[2] R. L., c. 173, § 60.

[3] St. 1851, c. 233, § 104.

[4] Hand *v.* Hughes, 14 Law Reporter, 393; and see Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320, at p. 324.

[5] St. 1852, c 312, § 67.

[6] 13 Allen (Mass.) 320.

policy was made by the defendants as a contract or evidence of a contract, binding upon them;" and he cited Williams *v.* Cheney[1] in which the court had said that the statutes "secure to parties the right to make complete statements of all facts in relation to which they may be interrogated in any suit, and guard them against being compelled to make partial and garbled disclosures in answer to artfully contrived questions."

The Use of Interrogatories at Trial.

"The party interrogated may require that the whole of the answers upon any one subject matter inquired of shall be read if a part of them is read; but if no part is read the party interrogated shall in no way avail himself of his examination or of the fact that he has been examined."[2]

The original provision[3] required that if any answers were read, all should be read if the party interrogated so desired. In the revision of 1852 this requirement was limited to "any one subject matter inquired of."[4] This clause is similar to the clause, "issue to which the interrogatory relates," already considered in connection with the right to qualify answers. In fact, Gray, C. J., in Churchill *v.* Ricker,[5] appears to have regarded the two clauses as having a single meaning. In Demelman *v.* Burton,[6] however, the court held that "any one subject matter inquired of" means that in a suit on a note in which the defendant denies both the signature and the consideration, the reading by the plaintiff at the trial of interrogatories and answers relating to the signature does not give the defendant a right to the reading of those relating to consideration. This case seems to show that the two clauses referred to do not have the same meaning, for although it may be possible to reconcile the decisions on the facts in Demelman *v.* Burton, and Baxter *v.* Massasoit Ins. Co., the language above quoted from the latter case and from Williams *v.* Cheney, seems to exclude from

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[1] 3 Gray (Mass.) 215, at p. 220.

[2] R. L., c. 173, § 88. In Shapleigh, *et al. v.* Burnap, 14 Law Reporter, 576 (1851), two plaintiffs (partners) were interrogated separately, and the defendant put in evidence answers of one. Held, that the plaintiff could not put in answers of the other.

[3] St. 1851, c. 233, § 110; see Hall, Mass. Prac., pp. 46–47.

[4] St. 1852, c. 312, § 73.

[5] 109 Mass. 209.

[6] 176 Mass. 363.

the "issue" clause the limited interpretation applied to the "subject matter" clause in Demelman *v.* Burton.

The practical result seems to be that if in a suit on a note the plaintiff asks the defendant whether he signed the note, the defendant may answer, "Yes, but there was no consideration for it," and if his answer is used at all, it must all be read; but if, to the question whether he signed the note, he answers "Yes," and then to a question whether there was any consideration for it he answers "No," the plaintiff may read the question and answer relative to the signing of the note, and omit that relating to the consideration, and the defendant cannot force the reading of his answer about consideration. In one case the test is the right to qualify answers; in the other the test is the matter of the interrogatory.

This result was evidently intended by the legislature of 1852, which enlarged the right to qualify answers and limited the right to force them into the evidence, and although the inability of parties to testify, which caused the enlargement of the right to qualify answers, has been removed, the practical result, above stated, of the two clauses referred to, seems still to be a fair one. The present reason for the rule of allowing answers of any matter relating to the issues raised by the pleadings, is that the interrogating party is not bound by the qualifying statements in the answer, and is not prevented from discrediting the party answering by offering the answer in evidence, and therefore it is reasonable to allow a party, within the bounds of relevancy, to say what he pleases in his answer in order to avoid the effect of skillful questions, especially as his answers are liable to be used in other suits as well as in that in which he is interrogated.[1] On the other hand, under the "subject matter" clause it seems fair that the court should say to a party, as in Demelman *v.* Burton, "You had a fair opportunity to tell your story in your own way in answer to each interrogatory, and having done so you cannot mix up the other party's case at the trial by forcing him to qualify your admissions when you failed to do it yourself."

THE ADMISSIBILITY OF ANSWERS IN EVIDENCE.

"The answer of a party to interrogatories filed may be read by the other party as evidence at the trial."[2]

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[1] See Williams *v.* Cheney, 3 Gray (Mass.) 215, at p. 220.

[2] R. L., c. 173, § 88.

This right is, of course, subject to the ordinary rules of evidence,[1] for, as already stated, a court cannot decide questions of evidence on a motion for answers to interrogatories. The fact that an interrogatory has been filed and answered, therefore, is no reason for its admission in evidence, and it cannot be read merely for the purpose of suggesting facts by getting in the question. As in the case of other admissions of a party, the question and answer together must have some legitimate bearing on the case.

In Hope Mutual Ins. Co. *v.* Chapman,[2] an action on a note, the answer set up the fact that the note was for a premium on a policy issued by the plaintiff company, and that, as the plaintiff company had failed to comply with certain statutes imposing conditions on its right to do business in Massachusetts, the note was void. The report of the case states that "the defendant offered interrogatories and answers of the plaintiffs thereto in which the plaintiffs state that the note in suit was given for a premium upon a policy." The plaintiff objected to the use of the answers as "stating the contents of the policy without the production of said policy," and the court sustained the objection on the ground that the attempt by a party thus to prove the contents of a document presumably in his own possession was a "clear violation of the familiar principle of law excluding parol evidence of the contents of a written paper." If the facts are correctly reported, the decision seems wrong. The details of the policy do not appear to have been material to the case, the fact that "a policy" was the consideration for the note being the defense. The admission of the plaintiffs, therefore, that a policy was the consideration, seems clearly competent, not because it is evidence, but because, like other admissions, it is an excuse for not offering evidence. The defendant in the case stated may have deserved his fate, but the court appears to have given a bad reason for disposing of a technical defense. If logically followed out, the language of the court would prevent the use of any admissions as to the contents of documents as primary evidence. The case has never been cited since in the reports and is not followed in practice.[3]

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[1] See, as to answers of joint parties, Dole *v.* Woolridge, 142 Mass. 161, at pp. 181–182.

[2] 6 Gray (Mass.) 75.

[3] See Clarke *v.* Warwick Cycle Manuf. Co., 174 Mass. 434.

THE DUTY OF THE COURT TO PROTECT THE RIGHT OF PRIVACY.

The broad principles of the right to privacy[1] underlie the statutes and decisions on discovery. Interference with this right under the sanction of the court should not be extended any farther than is absolutely necessary, and although it has been held in Williams *v.* Cheney[2] that answers to interrogatories in one suit may be used as admissions in another suit involving different issues, it seems that this must be taken with a qualification. A party's right is to discovery only for the purposes of the action in which discovery is sought. There is no right to discovery by statutory interrogatories for collateral purposes, and if a party interrogated, for reasonable cause, seeks before filing his answers to have their use restricted, it is submitted that he is entitled to protection, for the information disclosed under compulsion by the court must be considered as in its custody. There is nothing in the statutes which requires the entire contents of answers to be spread upon the court records and open to the inspection of the public. The interrogatories and answers are not part of the record,[3] but fall under the head of proof. The law[4] provides that "the answers shall be filed in the clerk's office," but an answer stating that full answers have been prepared and are ready to be delivered to the clerk under an order of secrecy directed to the clerk and to the interrogating party would seem to satisfy that statute if the facts justify such a course. No Massachusetts case has been found in which such an order of secrecy has been made; but the practice of making such orders appears to be established in the English courts in cases of discovery of confidential documents, and furnishes a reasonable solution of the problem of protecting one party as far as possible without depriving the other party of his undoubted right to discovery. The English form of order conditioned upon secrecy is given in a footnote;[5] it can be easily

[1] For a discussion of these principles see 4 HARV. L. REV. 193.

[2] 3 Gray (Mass.) 215.

[3] Storer *v.* White, 7 Mass. 448.

[4] R. L., c. 173, § 59.

[5] The following form is given in Seton on Judgments and Orders, vol. i. 6th ed. (1901), at pp. 58–59: "And the Plt by his Counsel, undertaking not to use or give in evidence, or cause or willfully suffer to be used or given in evidence, the letters or writings hereinafter referred to, or any copies or copy, abstracts or abstract, extracts or extract, thereof or therefrom, or from any or either of them, or parol evidence of the contents thereof, or any or either of them, in any action or actions already commenced,

adapted to circumstances, and might be very important to the party who was compelled to give discovery if the case in which it was given was settled without trial.

The Penalty for Failure to Answer.

If a party neglects or refuses to answer, "the court may enter a nonsuit or default."[1] In Baker *v.* Carpenter,[2] the court decided that a party has an absolute right to obtain answers before trial, and that an error of the court in refusing to order answers is not cured by the opportunity to offer testimony at the trial on the point covered by the interrogatories. In view of this decision it seems that the court is bound to enter a nonsuit or default rather than allow a case to go to trial while a proper interrogatory, seasonably filed, remains unanswered.

After a nonsuit has been entered, nothing further remains to be done unless judgment in set-off is claimed; but in case of a default damages remain to be assessed, and the question arises of the relative standing of the parties. In many cases this is a question of no practical importance, as in cases where the assessment of damages is merely a matter of computation the clerk attends to it, and in other cases either the defendant does not ask to be heard or, if he does, the court usually hears him. It may not infrequently happen, however, that a defendant will prefer to suffer a default rather than answer interrogatories if he can be sure of a chance to be heard on the question of damages, as a matter of right and not merely of discretion. In the recent case of Dalton-Ingersoll Co. *v.* Fiske,[3] the court remarked that "a person defaulted has no standing in court except to move to take off the default." This remark has accentuated a doubt at the bar as to the standing of a defaulted party on the question of damages; but it is submitted that the re-

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or hereafter to be commenced, against the defendants, or any or either of them, or against them or any or either of them jointly with any other person or persons, or against the writer of said letters either alone or jointly with any other person or persons for any other purpose or purposes whatsoever collateral to this action; Let the defts . . . produce," etc. Hopkinson *v.* Ld. Burghley, 2 Ch. 447, following language in Richardson *v.* Hastings, 7 Beav. 354.

[1] R. L., c. 173, § 66.

[2] Baker *v.* Carpenter, 127 Mass. 226. The court, however, has discretion as to the time before trial at which discovery shall be given, Stern *v.* Filene, 14 Allen (Mass.) 9; and when an interrogatory is apparently of remote bearing on the case the discretion of the trial judge in refusing to order answer will be sustained. Elliott *v.* Lyman, 3 Allen (Mass.) 110.

[3] 175 Mass. 15, at p. 20.

mark quoted was intended to apply solely to the right of a defaulted party in regard to the cause of action, and not to the assessment of damages, no question of damages being before the court.

It seems always to have been accepted as law in Massachusetts that if a defendant comes into court after default and before judgment is entered, he has a right to be heard as to the assessment of damages.

In 1811, in the case of Storer *v.* White,[1] the court said:

"If after the default of the defendant, the plaintiff shall move to have a jury to enquire into the damages at the bar pursuant to the provision of the Statute of 1784, c. 28, sec. 7, or if without such motion the judge shall assess the damages; and in either case the judge shall admit illegal evidence on the question of damages, the party aggrieved may file his exceptions to the admission according to the proceedings in our courts; and the judge ought to allow the exceptions, that the party may have the opinion of the whole court thereon." [2]

The logical and reasonable view of a default is stated, in the Connecticut case of Lamphear *v.* Buckingham,[3] as follows:

"It admits the cause of action as alleged, in full, or to some extent, according to the nature of the action. As it admits all the material facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain without further inquiry, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damage to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry."

The statute which provides that "upon a default at any stage of the proceedings . . . the damages shall upon motion of either party be assessed by a jury," [4] seems to insure each party a right to be heard before the jury.

It seems clear from the passages cited, which reflect the constant practice,[5] that a defendant after default in Massachusetts may insist

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[1] 7 Mass. 448.

[2] See also Parsons, C. J., in Perry *v.* Goodwin, 6 Mass. 498, at p 499; Folger *v.* Fields, 12 Cush. (Mass.) 93, and Devens, J., in Russell *v.* Lathrop, 117 Mass. 424.

[3] 33 Conn. 237, at p. 250.

[4] R. L., c. 173, § 54; see Gallagher *v.* Silberstein, 64 N. E. Rep. 402.

[5] See Howe's Practice (1834) 266, Colby's Practice (1846) 226, Aldrich, Eq. Pl. & Pr., 2d ed. (1896) pp. 233–235. All of these authors were Massachusetts judges.

As to other states, see Begg *v.* Whittier, 48 Me. 314; Parker *v.* Roberts, 63 N. H. 431, at p. 434; Webb *v.* Webb, 16 Vt. 636; Lamphear *v.* Buckingham, 33 Conn. 237; Shepard *v.* New Haven & Northampton Co., 45 Conn. 54, at p. 58; Batchelder *v.* Bartholomew, 44 Conn. 494.

on a hearing in damages, but he must come in and ask to be heard, and unless he does so the court may proceed without notice to him, although in practice he usually gets notice when the case is on the trial list.

If, however, any of the plaintiff's interrogatories, for failure to answer which the defendant was defaulted, relate to the question of damages, his right to be heard would seem to be subject to the discretion of the court. The reason for this is that, the damages being a part of the case, the plaintiff has a right to interrogate on that subject,[1] and if the defendant fails to answer, the only logical and reasonable course for the court is to refuse him a hearing and proceed *ex parte*. As the trial of the cause of action is eliminated by the default, however, it would seem a fair exercise of the discretion to give the defendant a further opportunity to answer before proceeding *ex parte*. So also the defendant even after default would seem to have a right to answers from the plaintiff to interrogatories relative to the mitigation of damages, and if the plaintiff fails to answer it would appear to be the court's duty to award merely nominal damages.

The Power to Enforce Answer by Contempt Proceedings.

Assume that an *ex parte* hearing is not sufficient for the plaintiff, but that he needs discovery from the defendant for use at the *ex parte* hearing, as in a suit for breach of the defendant's agreement not to sell within a certain district, the defendant having peculiar knowledge of the damage done. Has the court power to force answers by process for contempt? Such power has probably never been used in Massachusetts in such a case, and it is an open question whether it exists, and whether the section which says that the court on failure of the interrogated party to answer "may enter a nonsuit or default"[2] is exclusive or merely permissive.

It may be said that, as the court has no authority to order discovery at law except by the statute which specifies its powers, these powers must be limited strictly by the wording of the statute which gives the power to "nonsuit or default." On the other

[1] This statement has been disputed, but it seems the only reasonable construction of the statute giving the plaintiff a right to interrogate in support of his suit. R. L., c. 173, § 57. See Harris *v.* Collett, 26 Beavan, 222; Pape *v.* Lister, L. R., 6 Q. B. 242; Wilts, etc., Co. *v.* Swindon Water Works Co, 20 W. R. 353.

[2] R. L., c. 173, § 66.

hand, the statutes giving the right to interrogate say that interrogatories "shall" be answered,[1] and give the court power to "order" answers, and R. L., Chapter 166, § 1, provides that the courts "shall have and exercise all the powers which may be necessary for the performance of their duties," and that they "may issue all . . . processes . . . which may be necessary or proper to carry into effect the powers granted to them." The statutory system of discovery was adopted as being more convenient than the system of discovery by bill in equity, and, as process for contempt is the regular method of compelling discovery in equity, a reasonable interpretation of the statutes providing for discovery at law appears to be that the court should have the usual power to enforce answers, and that the provision for a nonsuit or default gives an additional convenient power which would not exist in the absence of special provision.

This interpretation is strengthened by the fact that in the statutes extending the provisions for statutory interrogatories to the courts of Equity[2] and Probate,[3] the courts are given authority on failure of answers to enter "such order or decree as the case may require."

DISCOVERY IN EQUITY.

Bills for discovery are not common, and the subject has been discussed in but few Massachusetts cases, the most important one in recent years being that of Post Co. *v.* Toledo, etc., R. R.,[4] in which the court held that the resident Massachusetts officers of an Ohio corporation might be made parties to a bill by an Ohio creditor for discovery of the names and addresses of stockholders of the company, in order that the creditor might bring suit against them in Ohio to enforce their statutory liability for the corporate debts.

In the opinion in this case Field, C. J., intimated that the exercise of jurisdiction for discovery in equity in aid of actions or defenses at law might be affected by the statutes giving the right to file interrogatories at law. It would seem, however, that the conditions of practice, which give the defendant his costs in a bill for discovery,[5] and the fact that under ordinary circumstances the interrogatory statutes give parties all that they need, are sufficient

[1] R. L., c. 173, § 59.
[2] R. L., c. 159, § 16.
[3] R. L., c. 162, § 42.
[4] 144 Mass. 341.
[5] See R. L., c. 203, § 13.

to deter counsel from resorting to equity without good cause. This being the case, any tendency of the court to discourage the exercise of its equity powers seems unfortunate, especially as equity practice in Massachusetts still suffers from the old traditions of limited jurisdiction.

In Colgate *v.* Compagnie Francaise, etc.,[1] Wallace, J., said:

"The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books, and writings in his possession or control. But it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle is more vigorously asserted by courts of equity than that they will not yield a jurisdiction once legitimately exercised, because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested in the court, it must remain there until the legislature shall abolish or limit it; for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. Story, Eq. 64. Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law."

Can Interrogatories for Discovery be Inserted in a Bill for Relief?

The question of equity practice relative to discovery which seems to call for special discussion is the question whether a plaintiff can still seek discovery as an incident in a bill for relief, — a question which has assumed some practical importance since the recent decision in Pearson *et al. v.* Treadwell *et al.*,[2] that an answer in equity to a bill for relief which does not contain a prayer for discovery is merely a pleading, and exceptions no longer lie to it for insufficiency. This decision has settled a doubtful point[3] in accordance with the general equity practice outside of Massachusetts as to answers not under oath. The practical effect of

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[1] 23 Fed. Rep. 82.

[2] 179 Mass. 462.

[3] *Cf.* Chancery Rules of 1884, XVI., XVII., XVIII., and XXI., 136 Mass. 606-607.

the decision, however, is to leave a plaintiff entirely dependent on his right to discovery to obtain admissions of formal matters and to define the issues ;[1] and as interrogatories cannot be filed until after answer,[2] and an answer is not due until a month from the return day of the writ,[3] a plaintiff after filing his bill must wait a month and a half before he can begin to interrogate unless he is allowed to insert interrogatories in his bill. From the point of view of the court as well as of the plaintiff, such delay seems undesirable, especially as it seems probable that under the ruling in Pearson *v.* Treadwell answers in equity will gradually develop into mere general denials.

In 1883, however, a statute was passed providing that "an answer except to a bill for discovery only shall not be made under oath,"[4] and in Amy *v.* Manning,[5] Field, J. (later Chief Justice), said: "Since the passage of this statute (1883, c. 223), by the provisions of § 10, if the bill asks for relief, the answer cannot be sworn to, and discovery can only be had by interrogatories to the defendant as in actions at law." The ground for this view is the position of the word "only" and the use of the word "shall" in the clause above quoted from the statute. This clause, however, does not necessarily call for this construction; it is just as intelligible if construed as a direction that an oath is required only when discovery is prayed in the bill and then only to that part of the answer giving discovery. The construction here suggested may seem strained, but the following remarks seem to show that the legislature has made some straining necessary. If the view of Chief Justice Field was correct, then the clause in question had the effect of repealing the provision in the Public Statutes[6] which provided that "Discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

Since the passage of the Revised Laws of 1902, which re-enacted

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[1] Having been of counsel for the excepting party in Pearson *et al. v.* Treadwell *et al.*, the writer wishes to disclaim any intention of criticising that decision adversely; the object of the present discussion is merely to set forth clearly the present conditions of equity practice.

[2] R. L., c. 159, § 15.

[3] Chancery Rule VIII.

[4] St. 1883, c. 223, § 10.

[5] 149 Mass. 487, at p. 491. See also Aldrich, Eq. Pl. & Pr., 2d ed., pp. 150, 365, and Gray, C. J., in Ahrend *v.* Odiorne, 118 Mass. 261, at p. 269.

[6] P. S., c. 151, § 7. *Cf.* Parker *v.* Simpson, 62 N. E. Rep. 401, in which counsel attempted to raise the question, but the court declined to pass on it. See also Bliss *v.* Parks, 175 Mass. 539.

both the clauses above quoted,[1] it would seem that both clauses must be given equal force, and that the legislature answered the view of Chief Justice Field by providing that discovery may be sought in a bill for relief.

From the point of view of policy the practical importance of the right to seek discovery in a bill for relief is that the exercise of this right may go far toward preventing the growth of the practice of making non-committal answers. One great merit of equity pleading hitherto has been its specific character, for, as a learned judge once said to the writer: "A well-pleaded equity case tries itself on most points." The practice of making full and specific answers was the result of the requirement of sworn answers which were open to exception for insufficiency. Now that the requirement of an oath and the liability to exception are both removed, and under existing law statutory interrogatories cannot be filed until after answer, there appears to be nothing but traditional practice to prevent answers in equity from becoming mere general denials.[2] The insertion of interrogatories or a prayer for discovery in the bill, although it would have the undesirable result of lengthening the bill and answer, would yet counteract the tendency of defendants to put everything in issue, for a defendant would be less likely to deny in the pleading part of his answer what he would have to admit in his answer to the interrogating part.

It may be said that the combination of pleading and discovery in one answer tends to confusion in the law; but the law seems still to allow a plaintiff to call for both, and, in the absence of a more satisfactory provision, the duty to give both seems to afford a valuable protection to the present specific character of equity pleading in Massachusetts.

Can a Party get Discovery both by Bill and by Statutory Process in the same Case?

If the foregoing remarks are sound, this question arises.

The first section of Chapter 159 of the Revised Laws, except so far as it is controlled by other sections, provides for all the usual

[1] R. L., c. 159, § 12, provides that "discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

§ 13 provides that "an answer except to a bill for discovery only shall not be made under oath."

[2] *Cf.* 11 Harv. L. Rev. 206, and Chancery Rule VII., 136 Mass. 604.

equity process, including that for discovery. Among the sections containing rules of procedure, appear the following:

SECTION 8. . . . "suits in equity may be commenced by bill or petition, . . . or . . . by a declaration in an action of contract or tort . . ."

SECTION 12. . . . "Discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

SECTION 13. . . . "an answer except to a bill for discovery only shall not be made under oath . . . answers to interrogatories in a bill for discovery shall be made within such time as the court orders, and questions arising thereon shall be determined by the rules applicable to bills for discovery."

SECTION 15. "Either party may, at any time after the filing of the answer in a suit in equity, file interrogatories . . . in the manner and subject to the provisions of chapter one hundred and seventy-three relative to interrogatories in actions at law."

The above quotations seem to show that the statutory interrogatories are provided in addition to, and not in lieu of, discovery in equity, and that, therefore, a plaintiff may interrogate in his bill for relief, and a defendant may interrogate by cross bill for discovery, and on the coming in of the answer to the original bill each party may of right file further interrogatories under section 15. The second use of the word "or" in section 12 does not appear to give the court discretion to require an election between discovery under section 12 and discovery under section 15. Section 15 is specific in giving the absolute right to discovery after answer without regard to previous proceedings. Of course, the whole equity jurisdiction is to a certain extent discretionary; but this general doctrine is hardly intended to enable a court to exercise its discretion by denying to a party cumulative rights clearly given by statute.

Neither does the fact that, at a time when equity jurisprudence was unfamiliar in Massachusetts, equity procedure was expected to be superseded in practice by statutory procedure, affect the construction of the present statutes, for no intention appears in the statutes to abolish the equitable rules.

Again in equity neither party can file statutory interrogatories until after the answer to the bill is filed, whereas at law interrogatories may be filed by the plaintiff after entry and by the defendant after answer. This postponement of the plaintiff's right in equity has appeared ever since 1862.[1] The only intelligible reason for

[1] St. 1862, c. 40.

this distinction between the right at law and in equity appears to be that the legislature in 1862, appreciating that under the existing equity practice some of the issues would be defined by the bill and sworn answer, postponed the plaintiff's right to statutory interrogatories in order to avoid the cumbering of the record and annoyance of the court and parties by questions as to matters which would be admitted in the answer to the bill, and in order to allow the statutory interrogatories to be directed to the issues as defined by the bill and answer, thus giving the right to discovery both by bill and interrogatories.

It may be said, perhaps justly, that a fair system does not require these cumulative rights, and that any second opportunity to interrogate should be at the discretion of the court. The subject might be regulated by rule of court, but, in the absence of such rule, the law seems to be as above stated.

The result of this discussion is that there is nothing in the statutes either requiring or authorizing the court to decline to exercise the equity jurisdiction in any case in which discovery is allowable under the general principles of equity procedure. This jurisdiction is entirely independent of the interrogatory statutes, and, *per contra*, the statutory jurisdiction for discovery, both at law and in equity, seems to be independent of the equity jurisdiction.

CONCLUSION.

In criticising the system I have expressed the constructive view of its logical development as distinguished from the destructive or literal view naturally pressed by all litigants who are inconveniently interrogated. There are, however, three general considerations of practical policy which call for careful administration of the system.

In the first place, if one party to a suit is compelled to disclose his knowledge of the details of a case, there is danger of subjecting him to the perjury of his opponent or his opponent's witnesses. Vice-Chancellor Wigram said: [1]

"Experience has shown — or (at least) courts of justice in this country act upon the principle — that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend."

[1] Wigram on Discovery, 1st Am. ed., p. 263.

This is a real danger, and is one of the strong reasons for the rule against merely fishing questions such as the one in Wilson *v.* Webber already discussed in the first part of this article.[1] Like other dangers, however, its force as a restrictive argument is limited, and it does not seem to furnish sufficient justification for illogical discrimination in rules as to specific discovery, as shown by the passage already quoted from Lord Langdale relative to the discovery of the names of witnesses.[2]

In the second place the courts in administering the system are called upon to face the danger of causing damage by allowing or enforcing unnecessary and unfair interference with privacy.[3] It is submitted that much may be done to obviate this danger by orders of secrecy under penalty of contempt or pecuniary liability, as already suggested in the discussion of the right to privacy.[4]

The third danger of the system is that of causing unreasonable and unnecessary annoyance and expense by requiring investigation before answer. This applies especially to large business concerns, and is constantly gaining in force as business becomes more systematically organized and labor subdivided so that the executive head of a concern has very little knowledge of details as to which he may be interrogated. As against corporations or large concerns which are subjected to so many personal injury cases, the system of discovery, if skillfully used, may be made very oppressive unless carefully administered by the courts.

The fact that the system may be abused in cases against corporations, however, is an incidental result which should not be allowed to obscure the value of the system in the general administration of justice. The question is how to administer the system so as to minimize its danger without destroying its value.

It is submitted that the way out of the difficulty lies first in the careful scrutiny of interrogatories and the requirement of specifications sufficient to show clearly the materiality and the reasonable necessity of the discovery sought. Under the older systems from which equity procedure developed, a party in seeking discovery made specific charges of evidence which his opponent was called upon to answer,[5] and this old requirement that the court shall be informed of the reasons for granting discovery furnishes a part of the solution of the problem of fair administration.

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[1] 16 HARV. L. REV. 114.
[2] Ibid. p. 118.
[3] Wigram on Discovery, pp. 2–3.
[4] See p. 197, *supra.*
[5] See 11 HARV. L. REV. 208; *cf.* ibid. pp. 145–149.

In the same way, if a party declines to answer interrogatories, the court should be fully informed by him of his reasons for not answering, and, if the objection is made that an unreasonable investigation would be necessary before answering, facts should be stated to show this.

The interest of the community in having an efficient system seems to call for logical application of rules along the lines indicated. The establishment of illogical arbitrary rules confuses the subject, not only for the present, but for the future, even under an altered system the construction of which would naturally be affected by the earlier practice.

It is hoped that some of these suggestions may be of use to the profession in dealing with this system. Its value to the practitioner lies mainly in the opportunity which it offers for eliminating matters of formal proof, and for assisting in establishing facts which are sometimes difficult of proof, as, for instance, the delivery of goods. Furthermore, the Commissioners of 1851, who suggested the statutory system, prophesied that it would help to prevent unjust defenses, and its practical value for this purpose is illustrated by two cases from the writer's experience. In one the defendant was put into a dilemma where he had to choose between definite written perjury in answer to interrogatories or the abandonment of his whole defense. He defaulted rather than answer the interrogatories, although he had not hesitated at oral perjury on the stand in the lower court before appeal. In the other an officer of a defendant corporation was interrogated at an early period in the case. At the trial the theory of defense outlined in his answers was abandoned for another, and cross-examination of him as a witness brought out the inconsistency between his sworn answers to interrogatories and his oral testimony. This inconsistency had a very material effect in discrediting his defense. The verdict was for the plaintiff.

Frank W. Grinnell.

10 TREMONT ST., BOSTON, MASS.